

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BARRY M. PORTNOY and
GERARD M. MARTIN, as Trustees for
HUB PROPERTIES TRUST,
Plaintiffs,

v.

OMNICARE PHARMACEUTICS, INC.
and
OMNICARE CLINICAL RESEARCH, INC.,
Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' TRIAL BRIEF

JOSEPH J. McGOVERN
STEPHEN W. W. CHING, JR.
STEPHEN P. BOSIO
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Gerard M. Martin, as Trustees for HUB Properties Trust

Date: April 12, 2005

PLAINTIFFS' REPLY TO DEFENDANTS' TRIAL BRIEF

I. INTRODUCTION

Despite defendants' relentless efforts to obfuscate the facts and the law, any accurate assessment of this case leads inexorably to the conclusion that HUB is entitled to past due rent, accelerated rent, additional rent, restoration costs, late charges, interest and attorneys' fees. Moreover, a trial is unnecessary; applicable legal principles applied to the undisputed evidence before the Court permits easy calculation of HUB's damages. HUB's damages are \$14,637,308.21.

Defendants raise three points which warrant a reply.

First, for the first time in this litigation, defendants attempt to challenge the acceleration clause, claiming it is "illegal." Having failed to affirmatively plead illegality in their answer, as required by Fed.R.Civ. P. 8(c), defendants are barred from raising that defense now. Defendants ignore this procedural nicety and argue that the acceleration clause should not be enforced, based on the proposition that HUB need not worry about receiving timely rent payments in the future from Omnicare Pharmaceuticals, Inc., - - an entity that has been defunct for at least two years. As detailed below, there is simply no factual or legal basis for defendants' claim that the acceleration clause is not enforceable.

Second, defendants again ask to be relieved of their obligation to restore the Premises - - an obligation this Court has already stated rests squarely on defendants under the unambiguous terms of the Lease. In light of that reality, the "analysis" used to support defendants' position, i.e., ignoring the casualty clause on which the Court's determination is based and pointing instead to irrelevant Lease provisions, is baseless.

Third, defendants attempt to deny their obligation to pay HUB's attorneys' fees, principally by pretending that they have done nothing wrong. Defendants' conduct, *vis a vis* their legal obligations to HUB, has smacked of bad faith since the time of the flood. HUB was required by defendants' obdurate conduct, specifically their total and unjustified repudiation of their contractual obligations, to commence this action. Thereafter, over the course of almost three years, defendants forced HUB to incur more than \$1.8 million in attorneys' fees - - a sum vastly greater than what should have been spent on a collection action - - using the guise of a flood to avoid a contract defendants no longer liked or wished to honor.

Defendants have tried to wear HUB down with litigation: They conducted massive and unnecessary discovery, including nearly 30 depositions. They have inundated and continue to inundate this Court, including in their most recent brief, with a barrage of "defenses" which this Court resoundingly rejected almost a year ago; defenses which directly contradict their obligations under unambiguous Lease terms; and which clearly had and have no factual or legal basis.

Plaintiffs' claim for attorneys' fees proceeds from the fact that the heart of defendants' case has been pretextual and completely without merit from the start¹. Defendants' claim that they were excused from their Lease obligations rests solely on the false premise, developed initially by unscrupulous executives and later refined by lawyers, that suddenly, five years into a 15-year lease, for reasons previously completely unknown to defendants, the Premises could no longer be used for pharmaceutical - related purposes. The facts of record, have always belied defendants' claim. The reality is that after the flood, defendants decided they would not remain in the Premises because the costs of restoration exceeded the insurance proceeds defendants

¹ Defendants have failed to convince the Court of the merits of even a single substantive point in this litigation.

collected and because defendants believed they would not be able to generate as much profit as they did prior to the flood. (Portnoy, 2004 U.S. Dist LEXIS 12235, at *14).

Of equal or greater importance to HUB's claim for attorneys' fees is the fact that Omnicare knew its defense was specious, as "exhibited by their use [of the Premises] after they made partial repairs." (Id.) at 13. In truth, defendants made their decision to abandon the Premises even before they made any attempt to determine whether it could be reused, as reflected by *inter alia*:

- Omnicare's executives' discussions with insurance adjusters **9 days after the flood**, wherein Omnicare disclosed that it wanted to "break the lease" and "to withhold any work beyond those activities absolutely necessary" (Report of Discussions by J&H Marsh & McLennan, MAR-C 4353, attached hereto as Exhibit "1");
- Instructions Omnicare management gave to the president of its pharmaceutical division **16 days after the flood** not to do any work "above and beyond the needs of a "normal" [i.e., non-pharmaceutical] tenant," including instructions "not to remove ceiling tiles [containing microbial contamination] throughout the facility..." (July 3, 2001 Omnicare Pharmaceuticals, Inc. Interoffice Memo from Kenneth Feld to Dave Morra and Ron Greenspan, Exhibit Feld-65 to 4-9-03 Deposition of Kenneth Feld, attached hereto as Exhibit "2");
- The fact that Omnicare made its decision not to return to the Premises around August 2001 – **more than 4 months before** the engineering firm HUB had hired for defendants' benefit had even released its final report as to the flood mitigation measures that could be taken. (October 29, 2003 Deposition of defendants' corporate designee, David Morra, at 163-164, attached hereto as Exhibit "3"; 7-22-03 Deposition of Omnicare Pharmaceuticals Controller, James McDevitt, at 71-72, attached hereto as Exhibit "4"); and
- Instructions that Omnicare management gave to the controller of its pharmaceutical division in August 2001 to "hold off" commencing construction needed to restore the Premises to pre-flood condition, despite his offer to buy and install drywall and carpet at night by himself. (S43; Exhibit McDevitt-34 to 7-22-03 deposition of Omnicare Pharmaceuticals Controller, James McDevitt, at McDevitt 1118, attached hereto as Exhibit "5").

Defendant's own employees' testimony establish that defendants decided to "break" the Lease sometime between June 26, 2001 and August 2001. That decision was made not because

of any “an inability to use the building” but because defendants foresaw that they would not have generated as much profit after the flood as they had previously. (Portnoy, 2004 U.S. Dist. LEXIS 12235, at *14). This reality is and has been embedded in the record since the commencement of this case and cannot be changed no matter how much lawyering defendants bring to bear.

Defendants’ also have admitted that they failed to purchase adequate flood insurance. As a result, they faced over \$7 million in out-of-pocket expenses to restore the Premises. (10-29-01 Deposition of Defendants’ corporate designee, David Morra, at 147-48, attached hereto as Exhibit “6”). As defendants’ vice president admitted, had defendants “received adequate insurance proceeds . . . , then [they] most likely would have continued to stay in business.” (03-12-03 Deposition of David Froesel at 96-97, attached hereto as Exhibit “7”). As Omnicare Pharmaceuticals president, Kenneth Feld, admitted, this “screw-up [of] the insurance coverage” -- not the inability to use the Premises -- was “the basic cause of this whole situation.” (December 13, 2001 e-mail from Ken Feld to Ronald Greenspan, Omnicare 9363, attached hereto as Exhibit “8”). Defendants are prisoners of Dr. Feld’s words. Their defenses have been pretextual and hopeless from the start and they knew it; yet they never stopped vigorously litigating. Such conduct amounts to bad faith and serves as a basis for an award of HUB’s attorneys’ fees.

II. THE ACCELERATION CLAUSE OF THE LEASE IS FULLY ENFORCEABLE AND HUB CORRECTLY APPLIED IT IN THIS CASE.

Conceding that the Lease allows HUB to accelerate rent upon default, defendants nevertheless ask the Court not to enforce the acceleration provision and to deny HUB's claim for accelerated rent on the basis of three assertions: (1) the accelerated rent provision of the Lease exacts an illegal penalty and thus is unenforceable; (2) HUB's repossession of the Premises precludes any claim for accelerated rent; and (3) the Court, in its equitable discretion, should not enforce the acceleration clause because "there is no possibility that HUB would have to pursue OPI to collect the rent under the Lease as it becomes due."

Defendants' claim that the acceleration clause is illegal is totally groundless. First, defendants waived this affirmative defense by failing to assert it in their pleadings trial. Prinz v. Greate Bay Casino Corp., 705 F.2d 692, 694 (3d Cir. 1983). Second, courts have repeatedly upheld the enforceability of acceleration clauses where, as in the Lease here, the landlord is required to credit the defaulting tenant with amounts received from a subsequent tenant. Onal v. BP Amoco Corp., 275 F. Supp. 650, 670 (E.D. Pa. 2003).

Similarly, defendants' claim that repossessing the Premises upon defendants' abandonment bars HUB's claim for accelerated rent is baseless. The same argument was recently rejected by the United States District Court for the Eastern District of Pennsylvania in Onal, which defendants cite in their Trial Brief. The Court in Onal held that a landlord was "right" in "accelerating the rent, if the lease so provides, taking possession and re-letting the premises with a **credit to the tenant** in the amount of rent paid by the replacement tenant." Id. (emphasis added).

Further, the "equities" in this case certainly do not require the Court to disregard the acceleration clause, in favor of allowing defendants to pay future rent as it becomes due,

because “there is no possibility that HUB would have to pursue OPI to collect the rent under the Lease as it becomes due.” This statement, is undermined by defendants’ complete and unjustified refusal for almost four years to pay **any** monies to HUB. It is further undisputed that rather than being a viable, creditworthy business entity, OPI has been defunct for years. (October 29, 2002 Deposition of Defendants’ Corporate Designee, David Morra, at 267). In the words of OPI’s counsel “The OPI business no longer exists.” (Email from Adam Share, Esq. to Joseph McGovern, attached hereto to Exhibit 9). HUB would be hard pressed to collect monthly payments from an entity whose business no longer exists.

Defendants also maintain that: (1) HUB is not entitled to pre-judgment interest on past due rent from the date it gave its acceleration notice but only from the date each monthly rent payment became due, irrespective of HUB’s acceleration demand; and (2) rent past due and owed as of the date of trial must be discounted to present value.

It is well-settled that only future damages should be discounted to present value. See, e.g., Shealy v. City of Albany, 137 F.Supp.2d 1359, 1368 (M.D. Ga. 2001) (“Only those amounts actually representing amounts to be paid from the date of this Order forward are discounted to present value”); Bernier v. Burris, 113 Ill.2d 219, 235, 497 N.E.2d 763, 771 (Ill. 1986) (“Only future damages to be paid at the present time require reduction to present value”). Thus, HUB’s approach is correct. The discount is to be applied only to accelerated rent from April 15, 2005 the February 16, 2012.

Courts, including this Court, have repeatedly allowed pre-judgment interest on accelerated rent from the date of acceleration.² See, e.g., Midlantic Commercial Leasing Co v.

² Contrary to defendants’ assertions, HUB is not seeking pre-judgment interest on that portion of accelerated rent from the date of trial (April 15, 2005) forward.

Tender Loving Care, Civil Action No. 88-9545, 1990 U.S. Dist. LEXIS 6520, *9 (E.D. Pa. May 23, 1990).

Defendants are proceeding in bad faith. The Court must reject the defenses respecting accelerated rent and award HUB \$10,544,845.92 in past due and accelerated fixed basic rent.

III. THE LEASE UNEQUIVOCALLY REQUIRES DEFENDANTS TO RESTORE THE INTERIOR OF THE PROPERTY WITHIN A REASONABLE TIME AFTER THE FLOOD.

Defendants stipulate that it will cost almost \$1 million to restore the interior of the Premises to pre-flood condition (See, April 6, 2005 Stipulation as to Additional Rent and Restoration Costs), but they maintain that they are not obligated to make those restorations because: (1) their obligation to make post-flood restorations is not governed by the provision specifically relating to casualty damage (§10.02) but by Lease provisions unrelated to casualty which generally relate to “construction of improvements”; (2) §10.02 does not apply since defendants were unable to use the Premises after the flood for its intended purposes; (3) contrary to §10.02’s explicit obligation to make the repairs “with reasonable promptness,” any obligation to restore the Premises would arise only at the end of the term of the Lease; and (4) HUB “has not been damaged in whole or in part” by defendants’ failure to make the required restorations because HUB will have to completely demolish the interior for a new tenant regardless of any repairs defendants make. (Defendants’ Trial Brief at 7-8, 19-25).

This Court already definitively ruled that (1) the plain language of §10.02 of the Lease required defendants to restore the interior after the flood (which they have still not done); and (2) the Premises is and was useable after the flood for its intended purposes as evidenced by defendants’ actual use. (Portnoy, 2004 U.S. Dist. LEXIS 12235, at *10, *13-*14). Defendants’

assertions that HUB “has not been damaged” by defendants’ failure to restore is equally baseless. One has only to drive by the Premises to observe that defendants left HUB with severely damaged premises which is desperately “in need of renovation.” (*Id.*, 2004 U.S. Dist. LEXIS 12235 at *16). As set forth in ¶¶ 29 and 30 of the affidavit of David Campoli attached to Plaintiffs’ Trial Brief, defendants’ failure to restore the Premises has significantly affected HUB’s ability to market and relet the Premises to a new tenant, and thus, ironically, has limited HUB’s ability to mitigate the damages HUB seeks against defendants. Contrary to the assertions of defendants’ expert, Tim Monahan, Mr. Campoli states that in all probability, had defendants completed the required restorations, a new tenant (including Allegheny Valley School) would have been able to reuse a sizeable portion of Premise’s interior, probably 65%-90%. (Campoli Affidavit, Exhibit 2 to Plaintiffs’ Trial, at ¶¶35-36).

Accordingly, none of defendants’ excuses for repudiating their restoration obligation has any factual or legal support. This Court should award HUB \$928,885.00 in restoration costs.

IV. HUB IS ENTITLED TO RECOVER ITS ATTORNEYS’ FEES.

Under the so-called “American Rule”, parties to litigation normally pay their own attorney’s fees regardless of the outcome. *Aleyska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). There are, however, certain exceptions to this general rule, including where the unsuccessful party “acted in bad faith, vexatiously, wantonly or for oppressive reasons. *Id.* See also *Chambers v. NASCO*, 501 U.S.32 (1991)(A court has inherent power to award attorney fees on grounds of bad faith.), *Perichak v. Int’l Union of Electrical Radio & Machine Workers Local 601*, 715 F.2d 78 (3rd Cir. 1983)(same). Omnicare’s actions both before and during the

pendancy of this litigation more than amply establish bad faith and justify an award of attorneys' fees to HUB.

A. The Contract Provisions Are Unambiguous.

Where the provisions of a contract are unambiguous, litigants who pursue spurious claims or defenses are by definition acting in bad faith. In *ABEX, Inc. v. Koll Real Estate Group*, 1994 Del. Ch. LEXIS 213 (De. Ch. Ct. 1994), a tax sharing agreement unambiguously stated that the two corporations were to share tax liability under the circumstances of the case, and the defendant corporation did not deny its responsibility under the agreement. Rather, they asserted several affirmative defenses as to why it should not be obligated to pay. The court concluded "Actions by a defendant which necessitate judicial intervention to secure a clearly defined and established right, are evidence of bad faith. So also are actions by the defendant designed to force an opposing party to resort to litigation for the purpose of causing unreasonable delay." *ABEX*, 1994 Del. Ch. LEXIS 213 at * 61. *See also First Bank of Marietta v. Hartford Underwriters Insurance Co.*, 115 F. Supp.2d 898 (S.D.Oh. 2000)(assessing attorneys' fees against plaintiff who failed to fulfill an express contract requirement but sued to recover under the contract nonetheless), *Universal Resources Corp. v. Panhandle Eastern Pipeline Co.*, 1986 U.S. Dist. LEXIS 27373 (N.D.Tx. 1986) (granting summary judgment and attorneys' fees where a defendant presented erroneous defenses for violation of an unambiguous contract which was the result of arms'-length negotiations), *Cape Verde v. A&A Partners*, 89 F.R.D. 14,22 (S.D.N.Y. 1980)("Most significant to the 'bad faith' analysis is that plaintiff was compelled to sue to recover a deposit clearly due and owing, a matter which was never seriously disputed by defendant prior to or during the litigation.").

Omnicare's behavior is similar to that described in these cases. Omnicare and HUB were both sophisticated parties engaging in an arms'-length transaction. The contract they made, as this Court has held, could not have been clearer about Omnicare's obligations. They were obliged to pay rent, regardless of whether they were making money and they were obliged to repair the interior of the Premises after the flood, regardless of whether they had insurance. Despite the clarity of the agreement, Omnicare has forced HUB to spend \$1.8 million of dollars to obtain what was legally, clearly and unequivocally **theirs by right**. Omnicare has behaved in bad faith and attorneys' fees should be assessed against them.

B. Omnicare Acted In Bad Faith Both Before And During The Pendency Of The Suit.

Third Circuit courts have granted attorneys' fees where defendants' behavior *before* the litigation was reprehensible and that behavior continued in mounting spurious defenses *during* the litigation. In *Nagy v. Bistricher*, 770 A.2d 43 (Del.Ch.Ct. 2000), a minority shareholder sued the two majority shareholders for appraisal and for breach of fiduciary duty and bad faith in connection with a merger of the corporation with another entity that the majority shareholders also controlled. In pursuing the merger, the majority shareholders did not consult the minority shareholder in deciding to proceed with the merger, did not disclose any information to the minority shareholder regarding the merger, and did not set a firm offer for the minority shareholder's shares until after the minority shareholder was required to file an appraisal petition. To justify these actions to the court, the majority shareholders made arguments that the court concluded "In view of the clarity of legal principles involved, it is difficult to fathom why [they] were advanced." *Nagy*, 770 A.2d at 65. As a result, the court granted attorneys' fees under the bad faith exception to the American Rule. *See also Perichak v. Int'l Union of Electrical Radio &*

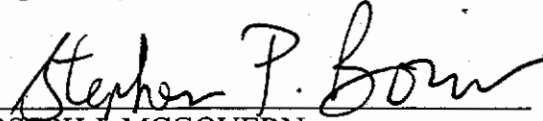
Machine Workers Local 601, 715 F.2d 78, 83 (3rd Cir. 1983)(“On the basis of the record developed in the...merits findings and credibility determinations, Perchiak could not have commenced his action in other than ‘bad faith’, *nor could he have maintained this action with any reasonable prospect of prevailing on the merits.*”), *Horst Masonry Construction, Inc. v. ProControls Corp.*, 2000 U.S. App. LEXIS 3688 (8th Cir 2000) (awarding attorneys fees where general contractor failed to acknowledge money owed to subcontractor and asserted meritless defenses to the claim until two days before trial).

The majority shareholders behavior in *Nagy* is analogous to Omnicare’s actions in abandoning their obligations to HUB. Prior to the litigation, Omnicare acted in bad faith by deciding to breach the lease upon the event of the flood without allowing even enough time to evaluate the damage, then stringing HUB along while they completed a few lucrative contracts, and then out-and-out lying that the Premises was no longer usable for the purposes set forth in the Lease. Subsequently, during the litigation, Omnicare has repeatedly and knowingly made specious arguments. As in *Nagy*, this Court should grant HUB’s request for attorneys’ fees in the amount of \$1,856,392.14, through March, 2005.

V. **CONCLUSION**

For the reasons set forth above and in HUB's Trial Brief, HUB respectfully requests an assessment of damages in the amount of \$14,637,308.21.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen P. Bosio", is written over a horizontal line.

JOSEPH J. MCGOVERN
STEPHEN W.W. CHING, JR
STEPHEN P. BOSIO
**OBERMAYER REBMANN MAXWELL &
HIPPEL LLP**

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Attorneys for Plaintiffs,
Barry M. Portnoy and Gerard M. Martin, as
Trustees for HUB PROPERTIES TRUST

Dated: April 12, 2005

EXHIBIT 1

J&H MARSH &
MCLENNAN

REPORT OF DISCUSSION

☐ PHONE CALL ☐ MEETING

PEND FOR:

DATE: / /	SPOKE TO: <i>Danica</i>		
TIME START:	ACCT/COMPANY: <i>For Brown 484-679-2846</i>		
FINISH:	PHONE: <i>6-16-01 Flood</i>		
SUBJECT/POLICY:			

ITEMS DISCUSSED:

- 6-21-01 For Brown called re. inventory & for*
- Called For back - Bill Thayer*
 - For General Belter proposal w/ \$*
 - For to for that dollar estimate to accompany*
 - Belter - day out & take at work & place where*
lot of for are going to be necessary
 - Thayer / For spoke of contracts - want to break both*
leases - He wants to w.M hold any work beyond only
7 those activities absolute necessary
 - Capital Monthly Vendor may be used - If Danica uses*
as wants vendor that is 10-15% less, Danica will
get difference.
 - Bill Thayer acknowledged that 2nd shift is inefficient and*
once customers get their inventory out, we should knock it
down to one shift.

ITEMS DISCUSSED:	COPY TO:	INFO	ACTION
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REPORTED BY:		<input type="checkbox"/>	<input type="checkbox"/>

(Print Full Name)

CONFIDENTIAL

MAR-C 0004353

PAGE OF

EXHIBIT 2

KEN,FELD

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3 NO. 02-CV-2905
4 BARRY M. PORTNOY and GERARD) DEPOSITION UPON
M. MARTIN, as Trustees for)
5 HUB PROPERTIES TRUST) ORAL EXAMINATION
)
6 - vs -) OF
)
7 OMNICARE PHARMACEUTICS, INC.) KEN FELD
and OMNICARE CLINICAL)
8 RESEARCH, INC.)
- - - - -

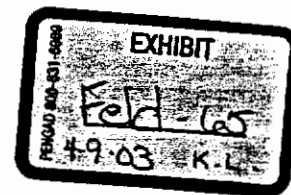
9
10 COPY

11 TRANSCRIPT OF DEPOSITION, taken
12 by and before KRISTIN N. LAFTY, Professional
13 Reporter and Notary Public, at the Law Offices
14 of OBERMAYER, REBMANN, MAXWELL & HIPPEL, LLP,
15 19th Floor, One Penn Center, 1617 JFK Boulevard,
16 Philadelphia, PA, on Wednesday, April 9, 2003,
17 commencing at 10:15 a.m.
18
19
- - -

20
21
22 REPORTING SERVICE ASSOCIATES (RSA)
A Veritext Company
23 1845 Walnut Street - 15th Floor
Philadelphia, Pennsylvania 19103
24 (215) 241-1000

OMNICARE PHARMACEUTICS, INC.

INTEROFFICE MEMO



To: Dave Morra and Ron Greenspan
From: Kenneth Feld
Subject: Clean-up of 525 Virginia Drive Facility
Date: July 3, 2001

It has come to my attention that you have directed Belfor not to remove the ceiling tiles throughout the facility and clean and sanitize the space above the tiles.

As you know, I had previously instructed Belfor to add this activity to their scope of work for the project. I did this as the ceiling tiles are a very good breeding ground for microbial contamination given the fact that 1) the facility, post flood exhibited > or = to 100% relative humidity and 2) E. coli, fecal coliforms, extremely high bacterial loads and yeast and molds were found in the facility. Removing tiles and cleaning/sanitizing the space above is the only prudent course of action for future safety concerns. This would be true whether Omnicare or another tenant occupies the facility in the future. If Omnicare does occupy the facility in the future, it must also be remembered that we will be operating a cGMP facility. We must do everything possible to control contamination as we handle pharmaceutical products.

This position has been discussed with experts from Perritt Laboratories, the microbiological testing laboratory routinely used by many pharmaceutical companies. They have concurred with the position stated above.

Based on these facts I will again ask Belfor to add this activity to their scope of work for this project.

K. M. Feld

1/c

J. Morra

K. Feld

Note:

The concern I raised was whether any work currently being considered was above & beyond the needs of a "normal" tenant - e.g. ceiling tiles

Don 7/5/01

EXHIBIT 3

DAVID MORRA

1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. 02-CV-2905

BARRY M. PORTNOY and GERARD) DEPOSITION UPON
M. MARTIN, as Trustees for
HUB PROPERTIES TRUST,) ORAL EXAMINATION

Plaintiffs,) OF

- vs -) DAVID MORRA

OMNICARE PHARMACEUTICS, INC.)
and OMNICARE CLINICAL
RESEARCH, INC.,)

Defendants.)

TRANSCRIPT OF DEPOSITION,
taken by and before F. DAVID DAMIANI, Registered
Professional Reporter and Notary Public, at the LAW
OFFICES OF OBERMAYER, REBMANN, MAXWELL & HIPPEL,
LLP, 19th Floor, One Penn Center, 1617 JFK
Boulevard, Philadelphia, Pennsylvania, on Tuesday,
October 29, 2002, commencing at 10:07 a.m.

REPORTING SERVICE ASSOCIATES (RSA)

DAVID MORRA

<p style="text-align: right;">162</p> <p>1 here. Clearly a flat surface of stainless-steel 2 could be cleaned and disinfected, so those types of 3 equipment, or that part of the equipment could be 4 cleaned. The concern was with electronics and 5 those that had places that couldn't easily be 6 gotten out. 7 Q. Where things would get inside the 8 intricate inner workings? 9 A. Right. 10 Q. That makes sense. Attached on page 256 11 and 257 seems to be a list of equipment. 12 A. Yeah, it may be. Again, we can ask them 13 to go through -- you know, go through -- yes, 14 that's exactly what that is. Major equipment. So 15 we did ask them to look at kind of the big stuff. 16 Q. It looks like they said that some of this 17 was reclaimable and some of it wasn't. More of it 18 wasn't. 19 A. Yes, that is correct. At the end of the 20 day most of it was not reclaimable. 21 Q. Now, the refrigerators, coolers and 22 freezers identified on this equipment list, are 23 they different than the ones that you put back into 24 service in September?</p>	<p style="text-align: right;">164</p> <p>1 A. Well, I believe it was around August of 2 2001 where we had a meeting, an internal meeting 3 discussing the potential options, and concluding 4 that based on quite a number of customer data 5 points, that the site wasn't going to be viable. 6 And from that point we then actually 7 proceeded to have discussions with your client to 8 see if there was a way we could work this out. 9 Some win/win solution whereby we could move our 10 operations to perhaps another site within their 11 portfolio, as one example. 12 So, you know, we kept HRPT informed of the 13 issues we had at that site. Had a face-to-face 14 meeting with the president of HRPT Properties 15 Trust. I thought it was important to have a 16 meeting face to face so that he understood the 17 nature of our business and why it was critical that 18 we not be in that kind of a site. The propensity 19 for flooding, the criticality of the products that 20 we make there, you know, for the customers that we 21 service. 22 So we began that dialogue in trying to 23 explore how we could work this out in a way that 24 everybody was made whole, so that we didn't end up</p>
<p style="text-align: right;">163</p> <p>1 A. Where are you looking? 2 Q. I'm looking at page 257, the very last 3 item. 4 A. Well, when you say put back, we were 5 talking about stability chambers being put back 6 into operation, not refrigerators, coolers and 7 freezers. These were different items. 8 Q. Are stability chambers identified anywhere 9 on this major equipment list? 10 A. Well, I don't think they would have been, 11 because we can't identify those, being able to 12 clean those. So they shouldn't -- I don't believe 13 it would be on this list. 14 Q. The equipment that these people were 15 looking at, this was all found out in the trailers 16 in front of the building? Is that when they looked 17 at it? 18 A. Yeah, on the side of the building we had 19 trailers that were locked up. 20 Q. Like the back of a tractor-trailer, right? 21 A. Yes. Rented trailers that were on the -- 22 you know, laying on the ground. 23 Q. When was the decision made not to return 24 to 525 Virginia with the Pharmaceuticals operation?</p>	<p style="text-align: right;">165</p> <p>1 -- because we had had a very good long-term 2 relationship with HRPT. We paid our rent every 3 month. They were a good landlord and we believed 4 we were a good tenant. 5 MR. SHARE: Answer the question. 6 You've answered the question. 7 THE WITNESS: Okay. 8 BY MR. HABER: 9 Q. August of '01 is when you decided not to 10 go back? 11 A. By August it was, I believe, one of the -- 12 we were beginning to heavily lean in that 13 direction, to say it's probably going to be 14 difficult to convince our customers to come back. 15 Q. So this report that's been marked as DD 16 No. 14, which is dated January of 2002, why were 17 you doing a report on the reclamation of the 18 equipment at that time? 19 A. Well, because, again, under the -- the 20 report was -- it was in January, but the work began 21 before that. 22 We wanted -- this is for equipment. This 23 is not for the building. 24 Q. Right.</p>

EXHIBIT 4

JAMES MCDEVITT

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3 NO. 02-CV-2905
4 BARRY M. PORTNOY and GERARD) DEPOSITION UPON
5 M. MARTIN, as Trustees for)
6 HUB PROPERTIES TRUST) ORAL EXAMINATION
7)
8 - vs -) OF
9)
10 OMNICARE PHARMACEUTICS, INC.) JAMES MCDEVITT
11 and OMNICARE CLINICAL)
12 RESEARCH, INC.)
13 - - - - -

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10
11
12 TRANSCRIPT OF DEPOSITION, taken
13 by and before KRISTIN N. LAFTY, Professional
14 Reporter and Notary Public, at the Law Offices
15 of OBERMAYER, REBMAN, MAXWELL & HIPPEL, LLP,
16 19th Floor, One Penn Center, 1617 JFK Boulevard,
17 Philadelphia, PA, on Tuesday, July 22, 2003,
18 commencing at 9:05 a.m.
19
20
21

22 REPORTING SERVICE ASSOCIATES (RSA)
23 A Veritext Company
24 1845 Walnut Street - 15th Floor
Philadelphia, Pennsylvania 19103
(215) 241-1000

JAMES MCDEVITT

<p style="text-align: right;">70</p> <p>1 opportunities into modifying the building to 2 handle flood abatement. 3 Q. Who attended that meeting? 4 A. I think Ken. I didn't attend the 5 meeting. I ended up getting reports. And I may 6 have had a discussion with Dave Campoli. I 7 forget. But I remember the reports came in. 8 And they were very lengthy and comprehensive. 9 Q. Okay. Well, let me just start off, 10 Dr. Ken Feld attended? 11 A. Yes. 12 Q. And I assume individuals from 13 Intrastructure attended? 14 A. Right. They were the consultant hired 15 by HUB Properties. 16 Q. Did Mr. Morra attend the meeting? 17 A. I don't know. 18 Q. And you said that you received 19 information as a result of that meeting? 20 A. Uh-huh. 21 Q. You said detailed reports? 22 A. Yes. 23 Q. Is that what you said? 24 A. I think I got them later on. Let's</p>	<p style="text-align: right;">72</p> <p>1 name Intrastructure been mentioned prior to this 2 meeting? 3 A. No. This would have been the first 4 day or one of the first times I had heard about 5 the company Intrastructure. Because they came 6 out to the facility, now that I recall. They 7 came out to our building and actually visited. 8 And Ken and I were at that meeting. 9 Q. Do you remember when that was? 10 A. It was around this time frame. I just 11 remember there was a meeting and then a 12 two-month gap or maybe three-month gap prior to 13 the arrival of the report. And then the report 14 came out, and we had already known we were going 15 to close. 16 Q. So Omnicare did not wait for the 17 report to come out before making their decision 18 to close down the facility? 19 A. Yes, yes. 20 Q. Was there any discussion about waiting 21 for the engineering reports to come in? 22 A. Not with me. 23 Q. Let me direct your attention to 24 McDevitt 1181, please. Do you have that in</p>
<p style="text-align: right;">71</p> <p>1 say January, February of 2002. 2 Q. Do you know if those reports were 3 forwarded to Omnicare Corporate? 4 A. That I don't know. I know that I got 5 them. But I don't know if they were received or 6 reviewed. I can't really answer that. 7 Q. Just along the lines of, you know, 8 what we were discussing before, do you know if 9 anyone from any of the Omnicare entities did 10 anything to further study what was brought up 11 and what was considered by Intrastructure? 12 A. No. The main thing I remember is that 13 the decision to close the plant was made in 14 February of 2002, which was concurrent or very 15 close to the arrival of the Intrastructure 16 reports. Because I remember getting the report 17 close to the date that we were being closed. 18 And I said, I really can't use this report now. 19 Q. But I think you just said before that 20 Omnicare -- that people in the Omnicare entities 21 were aware that the landlord intended to examine 22 possible flood mitigation efforts? 23 A. That's correct. 24 Q. Right. Had the concept -- had the</p>	<p style="text-align: right;">73</p> <p>1 front of you? 2 A. Yes. 3 Q. Towards the middle of the page, let's 4 start off with the line that says -- I think 5 that's end February? 6 A. Yes. 7 Q. 60 days to close business, exclamation 8 point, Joel Germunder, right? 9 A. Uh-huh. 10 Q. Message on bulletin board from Morra. 11 Did I read that correctly? 12 A. Uh-huh. 13 Q. Decision made to relocate business to 14 Toledo. Did I read that correctly? 15 A. Uh-huh. 16 Q. Straw dog. Is that straw dog? And 17 below that, is that a lie? 18 A. Uh-huh. 19 Q. And then to the right of that it says, 20 no cap dollar sign for Toledo? 21 A. Uh-huh. 22 Q. Come no plan? 23 A. Right. 24 Q. No personnel in Toledo. That's the</p>

EXHIBIT 5



JAMES MCDEVITT

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3 NO. 02-CV-2905
4 BARRY M. PORTNOY and GERARD) DEPOSITION UPON
M. MARTIN, as Trustees for)
5 HUB PROPERTIES TRUST) ORAL EXAMINATION
6 - vs -) OF
7 OMNICARE PHARMACEUTICS, INC.) JAMES MCDEVITT
and OMNICARE CLINICAL)
8 RESEARCH, INC.)

9
10
11
12 TRANSCRIPT OF DEPOSITION, taken
13 by and before KRISTIN N. LAFTY, Professional
14 Reporter and Notary Public, at the Law Offices
15 of OBERMAYER, REBMAN, MAXWELL & HIPPEL, LLP,
16 19th Floor, One Penn Center, 1617 JFK Boulevard,
17 Philadelphia, PA, on Tuesday, July 22, 2003,
18 commencing at 9:05 a.m.
19
20
21

22 REPORTING SERVICE ASSOCIATES (RSA)
A Veritext Company
23 1845 Walnut Street - 15th Floor
Philadelphia, Pennsylvania 19103
24 (215) 241-1000

PM
8/27/01

Budget

8/30/01 (BO Meeting)

→ Celebrex →

Hamill →

3/5 431 4918

1X 03 00 07 L6

Comm Mater → Payroll

MON

→ Campbell

Mawins

CIVIL & STRUCTURAL

✓

8/30/01

1-215 - 979 - 8067

→ ALLIANCE

ALLIANCE

✓

{ Billings, INVOICING, AA'S, }
→ JUNE

JUNE

MCCANN

{ space requirements
35-40 buildings
space requirements

Prof. Lab. Est. div.

11/1 530 2004

Relocation

TPVA

→ Renard contracted TEVA
on what to do w. inventory

Tues
8/31/01

Presentation (MR'S)

- Burns - called

Am Granger led up construction

EXHIBIT 6

DAVID MORRA

1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. 02-CV-2905

BARRY M. PORTNOY and GERARD) DEPOSITION UPON
M. MARTIN, as Trustees for
HUB PROPERTIES TRUST,) ORAL EXAMINATION

Plaintiffs,) OF

- vs -) DAVID MORRA

OMNICARE PHARMACEUTICS, INC.)
and OMNICARE CLINICAL
RESEARCH, INC.,)

Defendants.)

TRANSCRIPT OF DEPOSITION,
taken by and before F. DAVID DAMIANI, Registered
Professional Reporter and Notary Public, at the LAW
OFFICES OF OBERMAYER, REBMANN, MAXWELL & HIPPEL,
LLP, 19th Floor, One Penn Center, 1617 JFK
Boulevard, Philadelphia, Pennsylvania, on Tuesday,
October 29, 2002, commencing at 10:07 a.m.

REPORTING SERVICE ASSOCIATES (RSA)

DAVID MORRA

<p style="text-align: right;">146</p> <p>1 So it happened at a time when we were able</p> <p>2 to secure that area and be reasonably confident</p> <p>3 that we weren't exposing it to biohazards.</p> <p>4 Q. So in the time period immediately after</p> <p>5 the flood, you went and hired some outside outfits</p> <p>6 to clean the building up, I guess?</p> <p>7 A. Yeah. There are firms that specialize in</p> <p>8 flood recovery that got all the proper equipment</p> <p>9 and trained personnel to handle this sort of thing.</p> <p>10 They came in and essentially started recovering,</p> <p>11 taking walls out, drying the area, you know,</p> <p>12 whatever they had to do to recover it. And also</p> <p>13 bringing more material out so our people, our</p> <p>14 Omnicare Pharmaceuticals people could be sorting</p> <p>15 through it and see if they could identify specific</p> <p>16 projects for other customers, whatever remained of</p> <p>17 those projects.</p> <p>18 Q. Did you ever completely clean up that</p> <p>19 building?</p> <p>20 A. Clean, yes. I would say we completely</p> <p>21 cleaned it up. It is cleaned up today.</p> <p>22 Q. How much did it cost you to get that</p> <p>23 building cleaned up?</p> <p>24 A. A million dollars, maybe. Again, Ron I</p>	<p style="text-align: right;">148</p> <p>1 A. The insurance -- yeah, you could look at</p> <p>2 it that way. Out of pocket would have been an</p> <p>3 investment, perhaps.</p> <p>4 Q. Now, you said that this drug industry is</p> <p>5 heavily regulated. I mean, the FDA was, I think,</p> <p>6 an entity that you mentioned, and there might be</p> <p>7 others that sort of were --</p> <p>8 A. Primarily FDA. Primarily the FDA</p> <p>9 regulates the environment under which we produce</p> <p>10 product.</p> <p>11 Q. Is there some FDA procedure known as a 483</p> <p>12 report that you're familiar with?</p> <p>13 A. Yes.</p> <p>14 Q. What's a 483?</p> <p>15 A. Well, when the FDA comes in and does an</p> <p>16 inspection on the facility, typically that's</p> <p>17 unannounced. Sometimes they do announce it, they</p> <p>18 tell you they're coming in.</p> <p>19 A 483 would be a citation, if they note</p> <p>20 any observations, things that they, you know, don't</p> <p>21 like. They would issue a 483 citation on that</p> <p>22 observation. So it's their follow-up report after</p> <p>23 their inspection to the company that they've</p> <p>24 inspected.</p>
<p style="text-align: right;">147</p> <p>1 think would have more of those numbers. But it was</p> <p>2 a significant amount of money to clean that up.</p> <p>3 Q. How much money would it have cost you if</p> <p>4 you were going to put the building back in the</p> <p>5 condition it was in prior to the flood? By that I</p> <p>6 mean replace the equipment with new or cleaned</p> <p>7 equipment, which is something I understand that you</p> <p>8 were trying to do.</p> <p>9 A. Yeah, I seem to recall the number was</p> <p>10 somewhere around eleven million dollars.</p> <p>11 Q. So about eleven million dollars would have</p> <p>12 put you back in the same position as you were in</p> <p>13 before the flood?</p> <p>14 A. I believe that's the number.</p> <p>15 Q. How much flood insurance did you have?</p> <p>16 A. In actuality when all was said and done,</p> <p>17 about four million.</p> <p>18 Q. Did you recover that four million dollars</p> <p>19 in flood insurance?</p> <p>20 A. Yes.</p> <p>21 Q. So if you wanted to put the building back</p> <p>22 in the same position it was in, at least physically</p> <p>23 before the flood, your company would have been out</p> <p>24 of pocket seven million dollars?</p>	<p style="text-align: right;">149</p> <p>1 Q. Did the FDA come in after the flood to</p> <p>2 inspect the building?</p> <p>3 A. No, I don't think they inspected the</p> <p>4 building. They wanted to review our procedures for</p> <p>5 dealing with the drug product that had been</p> <p>6 destroyed by the flood.</p> <p>7 Q. Okay. But they weren't interested in the</p> <p>8 condition of the building?</p> <p>9 A. No. You would not want the FDA to inspect</p> <p>10 the building in that condition, because it's going</p> <p>11 to fail completely. So their intent -- they had</p> <p>12 asked -- we notified them of what happened, they</p> <p>13 wanted to come in and specifically look at the</p> <p>14 procedures that we followed, you know, post flood,</p> <p>15 did we handle the product properly, did we dispose</p> <p>16 of it properly and all that. We did well in that</p> <p>17 inspection.</p> <p>18 MR. HABER: Would you mark this</p> <p>19 as the next exhibit, please? DD No. 12.</p> <p>20 (At this time, a document was</p> <p>21 marked for identification as Exhibit</p> <p>22 Defendant's Designee No. 12.)</p> <p>23 BY MR. HABER:</p> <p>24 Q. I'm showing you a document that's been</p>

EXHIBIT 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

BARRY M. PORTNOY and GERARD M.
MARTIN, Trustees for HUB
Properties Trust,

Plaintiffs,

vs.

OMNICARE PHARMACEUTICS, INC., and
OMNICARE CLINICAL RESEARCH, INC.,

Defendants.

CASE NO.
02-CV-2905

Deposition of: DAVID W. FROESEL, JR.

Taken: By the Plaintiffs
Pursuant to Agreement

Date: March 12, 2003

Time: Commencing at 10:18 a.m.

Place: Thompson Hine, LLP
312 Walnut Street
Suite 1400
Cincinnati, Ohio 45202-4029

Before: Wendy L. Raymer, RPR
Notary Public - State of Ohio

ORIGINAL

1 as opposed to move it elsewhere?

2 A. If we had received adequate insurance proceeds
3 from Marsh, then we most likely would have continued to
4 stay in the business.

5 (Plaintiffs' Exhibit 13 was marked for
6 identification.)

7 BY MR. HABER:

8 Q. Before you look at the new document I just
9 marked, if you had received adequate insurance proceeds
10 from Marsh, that would have made it less expensive for the
11 company to restart your operations, and, therefore, make it
12 a more worthwhile investment; is that correct?

13 A. What I was saying is if Marsh had provided
14 Omnicare with the correct recommendation in terms of the
15 amount of insurance that the CRO or Omnicare should have
16 had in place with respect to that business, then the
17 decision would have been a lot easier for Omnicare to
18 continue the business. Without the adequate insurance
19 funding, it became a very difficult decision, from a
20 financial perspective, to justify. The insurance proceeds
21 were critical to the decision process in terms of whether
22 to restart the business or not.

23 Q. Without the insurance proceeds, Omnicare would
24 have had to obtain or contribute its own funds to start the

1 business up again?

2 A. Yes.

3 Q. Which would have reduced the financial
4 attractiveness of such an investment?

5 A. Yes.

6 Q. Is that right?

7 A. Yes.

8 Q. Let's look at the next exhibit. Froesel 13 is
9 a February 22nd, 2002 memo to Joel Gemunder from David
10 Morra, upon which you are copied, regarding "Pharmaceutics
11 transition." Do you recall receiving this interoffice
12 memo?

13 A. No.

14 Q. The memo reads, "The following actions were
15 taken this week: Informed Ken Feld on Thursday of the
16 decision to move operations to Toledo.

17 "Ken Feld met with employees on Friday to
18 inform them of the decision." And it goes on. What was
19 moved to Toledo?

20 A. The only thing I recall is at about the time of
21 the flood, or shortly thereafter, sometime, I believe, in
22 2001, the Pharmaceutics business either had or was working
23 on some sort of contract with an animal health-care
24 company, I think called Virbac, and we were working on an

EXHIBIT 8

Dave
We need to discuss
Ron

Greenspan, Ronald

From: Feld, Ken
Sent: Thursday, December 13, 2001 2:24 PM
To: Greenspan, Ronald
Cc: Morra, David; McDevitt, Jim
Subject: RE: FW Waste/Onyx

Ron,

No. I do not believe there is a more cost effective answer, given the amount of time and resources it will take my team to investigate. I do not have the heads I need to do the work I have. You have been insisting that we get the waste off our site ASAP. I have now found a way to do it. Please do not second guess.

Again, if you want the responsibility, you take it and I will be more than happy to stay out of your way. Remember, I did not screw-up the insurance coverage. That has been the basic cause of this whole situation.

Ken

-----Original Message-----

From: Greenspan, Ronald
Sent: Thursday, December 13, 2001 1:37 PM
To: Feld, Ken
Cc: Morra, David
Subject: RE: FW Waste/Onyx

Ken

The question remains-Do you believe there is there a more cost effective answer? Since the action will not begin until January, could the we use this time to discuss with other? Obviously you or your staff's would be required to do the evaluation of alternative proposals.

Ron

-----Original Message-----

From: Feld, Ken
Sent: Thursday, December 13, 2001 1:26 PM
To: Greenspan, Ronald
Cc: McDevitt, Jim
Subject: RE: FW Waste/Onyx

Ron,

1) Probably somewhere between, because the "dump" site would be more local. But remember, that would significantly delay the removal process because the sites could not handle all the material in a short time period.

2) We are not going to look for other haulers. If you want to investigate, please feel free to do so. You can then be present to handle all the paperwork and logistics needed from Omnicare's side to effect the entire clean-up.

Ken

-----Original Message-----

Omnicare09363

EXHIBIT 9

McGovern, Joseph

From: Share, Adam [Share@BlankRome.com]
Sent: Monday, April 11, 2005 1:48 PM
To: McGovern, Joseph
Cc: Schoenhaus, Todd
Subject: HUB v. Omnicare

Joe: This will reiterate my message of yesterday afternoon regarding HUB's inquiry concerning Omnicare's intentions for the use of 525 Virginia Drive going forward. Currently, it is Omnicare's intention to use the building for storage. The OPI business no longer exists and there is no plan to put any other manufacturing, production or office facilities in the building. -Adam

Adam M. Share
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
Phone: (215) 569-5447
Fax: (215) 832-5447
share@blankrome.com

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BARRY M. PORTNOY and	:	
GERARD M. MARTIN, as Trustees for	:	
HUB PROPERTIES TRUST,	:	
Plaintiffs,	:	NO. 02-CV-2905
v.	:	
OMNICARE PHARMACEUTICS, INC.	:	HONORABLE CLIFFORD
and	:	SCOTT GREEN
OMNICARE CLINICAL RESEARCH, INC. ,	:	
Defendants.	:	
	:	

CERTIFICATE OF SERVICE

I, Stephen P. Bosio, Esquire, hereby certify that on April 12, 2005, I caused to be served *Plaintiffs' Reply to Defendants' Trial Brief* via hand delivery upon the following:

Adam Share, Esquire
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103-6998



STEPHEN P. BOSIO
Attorney for Plaintiffs